ORIGINAL

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Tariff Filing Requirements for	)	CC Docket No. 93-36
Nondominant Common Carriers	)	

PETITION FOR PARTIAL RECONSIDERATION

I. Introduction and Summary

Bell Atlantic[1] respectfully asks the Commission to reconsider its Order[2] in this proceeding insofar as it exempts nondominant carriers from filing with the Commission copies of contracts with other carriers ("intercarrier contracts"). That rule contravenes the explicit language of Section 211(a) of the Communications Act. For the same reason that the Commission's forbearance decisions failed to withstand judicial scrutiny, this latest attempt to exempt certain carriers from statutory filing requirements exceeds the Commission's authority.

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[1] The Bell Atlantic telephone companies ("Bell Atlantic") are Bell Atlantic-Delaware, Inc.; Bell Atlantic-Maryland, Inc.; Bell Atlantic-New Jersey, Inc.; Bell Atlantic-Pennsylvania, Inc.; Bell Atlantic-Virginia, Inc.; Bell Atlantic-Washington, D.C., Inc.; and Bell Atlantic-West Virginia, Inc.

[2] ***Order***, FCC 95-399 (rel. Sept. 27, 1995).

II. The Communications Act Requires the Filing of Intercarrier Contracts.

Section 211(a) explicitly requires ***every carrier*** to file copies of ***all contracts*** with other carriers.[3] The Commission, however, without explanation, purports to exempt all carriers that it has classified as nondominant from this statutory mandate.

Judicial decisions interpreting the scope of the Commission's statutory authority to exempt carriers from provisions of the Act make clear that the Commission's Order is unlawful. In 1994, the Supreme Court struck down the Commission's forbearance authority that it claimed under Section 203 of the Act. The Court ruled that the statutory provision on its face subjects ***all*** common carriers to the core filing requirement of that section.[4]

This is true of Section 211 as well. Congress recognized that the formal mechanism of a tariff may not be needed when carriers are providing services to other carriers, so it allowed for service pursuant to contract. However, in order for the Commission to fulfill its statutory obligations[5] and to give notice to others of the rates charged, Congress mandated the filing of intercarrier contracts. Like the tariff provision, the contract filing requirement applies to "[e]very carrier" and requires the filing of "all

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[3] "Every carrier subject to this Act shall file with the Commission copies of all contracts, agreements, or arrangements with other carriers, or with common carriers not subject to the provisions of this Act, in relation to any traffic affected by the provisions of this Act to which it may be a party." 47 U.S.C. § 211(a).

[4] ***MCI Telecommunications Corp. v. American Telephone and Telegraph Co.***, 114 S. Ct. 2223 (1994).

[5] ***See, e.g.***, 47 U.S.C. §§ 201(b) and 202(a).

contracts." As with the Commission's forbearance policy, exempting non-dominant carriers from filing copies of intercarrier contracts "was not the idea Congress enacted into law in 1934."[6] Accordingly, the Commission does not have the authority to exempt nondominant carriers from the intercarrier contract filing requirements of Section 211(a).

The only time the Commission attempted to justify this broad exemption was nearly nine years ago.[7] At that time, the Commission erroneously found that the second clause of Section 211(b) allowing the Commission to waive the filing requirement for "minor" contracts modifies the mandatory filing language of subsection (a).[8] Its reasoning was that the permissive language of the first clause of subsection (b) (authorizing the Commission to require the filing of other contracts) already gave it the discretion to exempt certain types of contracts, so that the second clause would be superfluous if read only to modify subparagraph (b).[9]

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[6] ***MCI***, 114 S. Ct. at 2232.

[7] ***Amendment of Sections 43.51, 43.52, 43.53, and 43.74 of the Commission's Rules to Eliminate Certain Reporting Requirements***, 1 FCC Rcd 933 (1986) ("Reporting Order").

[8] 47 U.S.C. §211(b) provides:

> The Commission shall have the authority to require the filing of any other contracts of any carrier, and shall also have the authority to exempt any carrier from submitting copies of such minor contracts as the Commission may determine.

[9] Reporting Order at ¶¶ 8-10.

That interpretation is flawed. If Congress had intended the exemption for "minor" contracts to apply to subsection (a), it is reasonable to expect that the clause would have appeared in that subsection, instead of in the next subsection, where it modifies an additional grant of Commission authority. Furthermore, the exemption clause is anything but superfluous if it is read to apply only to subsection (b). That subsection authorizes the Commission to require the filing of "other" contracts of a carrier. The second clause allows it to exempt some of those "other" contracts, such as those valued below a certain dollar threshold. Read in that manner, the clause in question is not superfluous but is, instead, a specific modification of the authority granted in the first part of the subsection.

Even if the clause could reasonably be read to modify the mandatory language of subsection (a), the statutory language allows the Commission only to exempt specific ***contracts*** that it considers "minor" from the filing requirement, not all contracts entered into by broad categories of ***carriers***. As a result, even under the Commission's flawed construction of the scope of the subsection (b) exemption, its attempt to exempt broad segments of the industry from filing any contracts cannot stand.

III. Contracts Between Nondominant Carriers Cannot All Be Considered "Minor."

In the 1986 order that created the filing exemption, the Commission determined without further explanation that the routine filing of contracts by nondominant carriers, which the Commission had already exempted from filing tariffs under its forbearance policy, was "not useful to us in the performance of our monitoring duties."[10] Therefore, in a leap of faith, the Commission declared those contracts to be "minor" ones which need not be filed. Even assuming that the Commission could reasonably have found in 1986 that contracts between nondominant carriers were always "minor," much has happened in the intervening nine years that would make that finding invalid today.

In particular, in 1986, there were no Competitive Access Providers ("CAPs"). The interstate access services that CAPs provide interexchange carriers today are worth tens of millions of dollars. One interexchange carrier, AT&T, dominated the interexchange market far more than it does today, and, unlike today, AT&T was regulated as dominant.[11] Yet it still carries more than half of the long distance traffic in the United States and provides a great many of the facilities which its competitors, including MCI and Sprint, resell in providing their interexchange services. Contracts for these services are valued in tens or even hundreds of millions of dollars. Given the size and importance of these types

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[10] ***Id.*** at ¶ 11.

[11] The Commission has recently declared AT&T nondominant. ***Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier***, FCC 95-427 (rel. Oct. 23, 1995).

of arrangements to the interstate telecommunications marketplace, it is inconceivable that they could reasonably be considered "minor" and exempt from filing under Section 211(b).

IV. Conclusion

The Commission does not have the statutory authority to exempt any carrier or class of carriers from the intercarrier contract filing requirements of Section 211 of the Communications Act. Both as a matter of statutory construction and under the recent forbearance decisions, the Commission must require nondominant carriers to file copies of all such contracts. In addition, the justification the Commission gave for exempting such carriers from filing intercarrier contracts, even if valid in 1986, is no longer sound in today's environment. Accordingly, the Commission should reconsider its Order and amend Section 43.51 of its Rules to remove the nondominant carrier exemption.

Respectfully Submitted,

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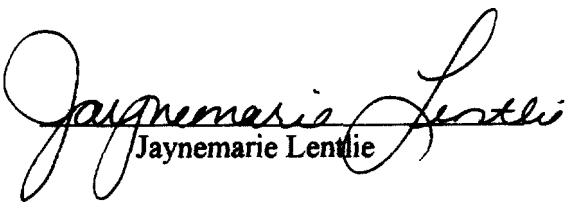
November 9, 1995

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing "Petition for Partial Reconsideration" was served this 9th day of November, 1995 by first class mail, postage prepaid, on the parties on the attached list.



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